DOCKET FILE COPY ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's	)	
Rules to Facilitate Future Development of	)	PR Docket No. 93-144
SMR Systems in the 800 MHz Frequency	)	RM-8117, RM-8030
Band	)	RM-8029
	)	
Implementation of Sections 3(n) and 322 of	)	GN Docket No. 93-252
the Communications Act - Regulatory	)	
Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the	)	PR Docket No. 93-253
Communications Act - Competitive Bidding	)	

To: The Commission

PETITION FOR RECONSIDERATION OF
SMALL BUSINESS IN TELECOMMUNICATIONS

SMALL BUSINESS IN TELECOMMUNICATIONS

Robert H. Schwaninger, Jr.,
Its General Counsel

Brown and Schwaninger
Suite 650
1835 K Street, N.W.
Washington, D.C. 20006
202/223-8837

Dated: September 2, 1997

Summary

The Commission has not gathered sufficient data and information to demonstrate that its auction program is feasible. Absent that vital information and providing the public with an opportunity to comment on the information, the Commission cannot be found to have engaged in reasoned decision making. It is insufficient under law for the agency simply to state conclusions without a clear demonstration of the factual basis upon which the agency relied.

The Commission's justification for mandatory relocation cannot be reconciled with logic or the existing use of the subject spectrum. Except for the provision of an expanded service contour for the protection of existing systems, the rules which were adopted provide none of these intended benefits. The agency failed to articulate any benefit to the affected operators.

The Commission's mandate from Congress requires that the Commission provide for the dissemination of initial licenses among certain classes of operators, including small business. Yet the agency's use of 50 channel blocks for allocation of the Lower 150 channels thwarted the intent of Congress to disseminate licenses to designated entities by requiring that successful bidders will also possess the wherewithal to construct fifty channels. There is no basis for this use of some different licensing opportunity to meet the agency's obligation to assure the dissemination of initial licenses among designated entities.

Allowing a licensee to get by with constructing only 50 percent of the authorized channels at a single location within the EA does not comply with statute and does not further the public interest in substantial construction. Section 309(j)(3)(D) of the Act requires that competitive bidding procedures must result in "efficient and intense use of the electromagnetic spectrum." The Commission has always required that an SMR licensee construct and place all authorized

channels in service within a specified period of time, and the Commission diligently recovered unconstructed channels for relicensing. This was also unlawful because an auction of SMR spectrum would give to geographic licensees a lesser regulatory burden than is imposed on site-by-site licensees.

The Commission's efforts to make spectrum available within the Lower 230 channels by waiving the construction requirements for affected trading channels requires scrutiny, clarification, and greater justification. SBT still cannot discern the basis for the agency's claiming to itself the authority to engage in auction of the 800 MHz spectrum, including the Lower 230 channels.

Insofar as the Commission attempted to delegate to the Wireless Telecommunications Bureau the authority to amend or alter the amounts of up-front payments and any "stopping rule" as each applies to an auction, without setting forth specific standards or parameters for the Bureau's future action, any action taken pursuant to that delegated authority violate the Administrative Procedure Act.

The Commission improperly shifted to commentors the burden of coming forward with proof regarding past discrimination, if, indeed, anyone other than Congress was required to produce anything more than the proof necessary to enact the statute. The statute does not require that the Commission, or anyone, establish a record of discrimination before doing what the Commission is directed to do, and the statute leaves no discretion in the Commission to decline to carry out the duty.

Table of Contents

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
Implementation of Sections 3(n) and 322 of the Communications Act - Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
Implementation of Section 309(j) of the Communications Act - Competitive Bidding	)	PR Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

Small Business in Telecommunications (SBT) hereby respectfully requests that the Commission reconsider its decisions within Second Report and Order, FCC 97-233 (released July 10, 1997) (the "Order"), and in support SBT states the following:

SBT has commented in this proceeding and its interest in the outcome of the Commission's decisions regarding the future use, allocation and licensing of 800 MHz spectrum is well known to the Commission. Among SBT's membership are many local operators of 800 MHz systems, including SMR-Trunked and Conventional systems, and licensees of geographic bases systems. Accordingly, SBT is vitally interested in the Commission's decision and actions and it is incumbent on the association to assist the Commission in efforts, to further the interests of its members.

The Commission Is Not Positioned To Take The Next Step

The Order represents an additional step in the Commission's agenda toward use of geographic licensing and competitive bidding for sales of 800 MHz licenses. Assuming, *arguendo,* that the Commission's efforts were supported by law and logic, the Commission would still be unprepared to take this additional step toward effecting its agenda until such time as the Commission has gathered sufficient data and information to demonstrate that its program is feasible. Absent that vital information and providing the public with an opportunity to comment on the information, the Commission cannot be found to have engaged in reasoned decision making.

At present, the Commission admits that it is unaware of the status of incumbent facilities; that it is not prepared to act on numerous petitions, pleadings, and applications for review pending before the agency; and that it is unaware of whether a successful participant in competitive bidding will receive all that the bidder believed would be forthcoming, or something less, or something more. Because the Commission did not complete the work necessary in the Order, it is does not have sufficient knowledge regarding its past licensing efforts and the factual environment to go forward, or to say with any reasonable assurance that its proposed efforts will result in the objectives articulated within its Order.

As evidence of the Commission's admitted lack of information necessary to demonstrate the reasonableness of its decisions, SBT notes that the Commission stated in its Public Notice entitled "FCC Announces Upcoming Spectrum Auction Schedule", which it released July 30,

1997 (DA 97-1627), and in another Public Notice released on August 6, 1997, under that portion entitled *Bidder Alert* that "the FCC makes no representations or warranties about the use of the spectrum for particular services." The Commission further stated under the same heading that "potential bidders are reminded that there are a substantial number of incumbent licenses already licensed and operating in the 800 MHz SMR service on frequencies that will be subject to the upcoming auction." Then further on, the Commission stated "the Commission makes no representations or warranties regarding the accuracy of information provided by incumbent licensees and incorporated into the database." Finally, the agency stated that resolution of pending matters, "could have an impact on the availability of spectrum to geographic area licensees in these auctions. [S]ome of these matters may not have reached final resolution by the time of the auctions." If the Commission did not have such information in July and August, it certainly did not have it in June when it released the Order. In sum, the Commission has admitted that its data base is not accurate for determining the availability of 800 MHz spectrum, the potential services which might be delivered employing that spectrum, and the likelihood that bidders will be able to deliver the promised services to the market following resolution of a myriad of pending matters.

Until such information can be provided to the public, commenting parties and the courts are also left to guess whether the Commission's program can achieve its stated objectives, or whether the program will merely reweave the fabric of the industry without any discernable

benefit to the public.[1] It is insufficient under law for the agency simply to state conclusions without a clear demonstration of the factual basis upon which the agency relied in making its conclusions.[2] SBT, therefore, urges the Commission to reconsider its Order to demonstrate the factual basis upon which its conclusions rest. Not until the Commission can conclude, following the making of decisions on matters which are pending before the agency and which would affect either the value or the availability of spectrum, that (i) in a representative sample of EA markets more than one entity possesses sufficient spectrum in each of the three upper channel blocks to engage in frequency migration and operation of the channel blocks in a contiguous manner;[3] and (ii) in its creation of rules for participation in competitive bidding, the agency has fulfilled its mandate to disseminate licenses among designated entities. To date, none of these elements has been demonstrated by presenting a reasoned analysis based on fact. Instead, the agency relied on conclusions, the source of which, if any, was not disclosed, and upon which no party had the opportunity to comment.

---

[1] SBT hereby expresses its support of the Motion For Stay, Petition For Reconsideration, and Motion to Set Aside filed by Nevada Wireless to the Commission's Public Notices of July 30, 1997 and August 6, 1997, incorporating herein the objections stated in those Motions as a further basis for the instant request.

[2] An agency is required to publish or make available critical data, such as scientific methodology, so that persons commenting on the rule can make meaningful submissions and criticisms, see, Portland Cement Association v. Ruckelshaus, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied,* 417 U.S. 921 (1974). That the Commission failed to do so in the 800 MHz Order, and later refused to do so in the Order , is a hallmark of this proceeding.

[3] The comments previously presented in this proceeding call into grave doubt whether the Commission's plan is feasible. Given the doubts articulated by commentors, it is incumbent upon the Commission to demonstrate factually that there exists a reasonable opportunity for the Commission's objectives to be reached.

The Commission Must Clarify Its Basis For Relocation

At paragraph 11 of the Order, the Commission suggested a justification for mandatory relocation which cannot be reconciled with logic or with the existing use of the subject spectrum. The Commission stated that the benefits which will be realized by incumbent operators on the Lower 230 channels will be the ability to "fill in gaps in the current systems, make modifications to meet shifting market demands, and expand into unserved areas." Except for the provision of an expanded service contour for the protection of existing systems, the rules which were adopted provide none of these intended benefits. For example, the operator of a system operating within a plant or for the purpose of serving a discreet area from a single location would not be provided any of the benefits touted by the agency. Since there is an abundance of such systems operating on the subject spectrum, the agency appears to have failed to articulate any benefit to these affected operators. Nor does the Commission demonstrate the source of the "greater flexibility" suggested for operators who cannot achieve a geographic license by virtue of operation of co-channel facilities from multiple sites, how that "the prospective relocation of SMR incumbents from the upper 200 channels to the Lower 230 is an obstacle to geographic licensing."

At para. 66 of the Order the Commission stated that geographic licensing of the Lower 230 channels would not occur until after the Upper 200 channels were auctioned and successful bidders have had an opportunity to relocate incumbents to the lower channels. Since the agency's present program requires a two-year minimum transition period for such relocation, it is apparent that relocation will, indeed, delay geographic licensing in the Lower 230 channels.

Further, the Commission cannot reasonably predict whether any opportunity for geographic licensing on the Lower 230 channels will be feasible or economically justified following relocation. Since the viability of the Commission's program for geographic licensing in the Lower 230 channels is dependent on and delayed by the relocation of incumbents from the Upper 200 channels, the agency's claim that relocation is not an obstacle to geographic licensing on the Lower 230 channels is wholly unfounded. SBT respectfully requests that the Commission reconsider its Order to reexamine its logic and the operation of its proposed rules.

Block Size, Disaggregation, Partitioning And The Commission's Mandate

The Commission's mandate from Congress requires that the Commission provide for the dissemination of initial licenses[4] among certain classes of operators, including small business, 47 U.S.C. §309(j). Yet the agency's use of 50 channel blocks for allocation of the Lower 150 channels thwarted the intent of Congress to disseminate licenses to designated entities by requiring that successful bidders will also possess the wherewithal to construct fifty channels. That the agency has attempted to provide some unproven opportunity for small business participation via bidding credits does nothing to ameliorate the effects of the Commission's choice of block size. The only comparable previous auction of spectrum would be the auction

[4] The only reasonable interpretation of the statute is that it requires that the Commission disseminate initial geographic licenses for 800 MHz spectrum to each of the designated entities. The Commission cannot assure that partitioning or disaggregation will ever occur, so it cannot rely on the actions of others to make second hand, partial licenses available. Certainly, the Commission could not disseminate 800 MHz geographic area licenses only to big business and offer General Mobile Radio Service licenses to small business on the premise that GMRS licenses are licenses.

of 900 MHz SMR spectrum which required a commitment to build only ten channels. Therefore, the 900 MHz auction does not serve as a basis for the Commission's actions in this proceeding. SBT has grave doubts as to whether small business will be able to finance participation in an auction and meet these construction requirements, and nothing contained in the Commission's records regarding past auctions would demonstrate any reliable support for the Commission's implied conclusion that this block size is reasonable in view of the agency's Congressionally mandated requirement.

The agency has attempted to suggest that the possibility for obtaining other than and less than an initial license for a geographic area via partitioning or disaggregation might be sufficient to meet its obligation to disseminate initial licenses among designated entities.[5] There is no basis for this use of some different licensing opportunity to meet the agency's obligation to assure the dissemination of initial licenses among designated entities. "Let them eat cake" has not been seen as an appropriate governmental position for the past couple of centuries. Since the Commission did not limit partitioning and disaggregation of licenses only to designated entities, partitioning and disaggregation provide nothing in furtherance of the Commission's duty to disseminate initial licenses specifically to designated entities.

---

[5] The Commission attempted to characterize the opportunity for small business to form consortia as one of its methods for fulfilling this obligation. Although SBT supports all avenues of capitalization and financing of small businesses, including consortia, SBT further points out that this opportunity cannot be found to create any substantive showing of the agency's performance under the relevant statute. If a small business cannot participate except by joining a consortium and, thereby, becoming something bigger than a small business which it has been, the Commission has not done its duty for small business.

In contrast, the agency has struck (insofar as it goes) the proper posture on partitioning and disaggregation in its decision not to allow EA licensees to recapture spectrum or area which it has assigned to partitionee or a disaggregatee, in the event that the partitionee or disaggregatee fails to properly employ the spectrum. Since the EA licensee is a part of the bargain which created the new licensee, the EA licensee should bear some degree of the risk of the other party's failure to comply with the construction and operation requirements of the agency. However, SBT notes that the Commission has not articulated what licensing method it might employ in reissuing the affected partitioned or disaggregated spectrum. Upon reconsideration, this matter should be clarified.

Construction Requirements

At paragraph 34 of the Order, the Commission stated that "we believe that by participating in the auction, licensees have shown that they are genuinely interested in acquiring spectrum to utilize and not warehouse," and it reiterated its vague construction requirements that demand that EA licensees "use at least 50 percent of the channels in their spectrum blocks in at least one location within the EA". At paragraph 44 of the Order, the Commission required that EA licensees need provide only "substantial service", which is defined as "service that is sound, favorable, and substantially above a level of mediocre service, which would barely warrant renewal." Contrary to the Commission's stated beliefs, its decisions invited the warehousing of spectrum, rather than the provision of quality service to the public.

The Commission did not and cannot demonstrate based on any reported study, fact, or use of its own data base, that mutual exclusivity will exist as between competing bidders for each block of spectrum. Therefore, the Commission was in error in claiming that any investment in the spectrum will be realized in the granting of licenses. Thus, the Commission's dependence on such investments as an EA licensee's incentive toward avoidance of warehousing was without support.

Allowing a licensee to get by with constructing only 50 percent of the authorized channels at a single location within the EA does not comply with statute and does not further the public interest in substantial construction. Section 309(j)(3)(D) of the Act requires that competitive bidding procedures must result in "efficient and intense use of the electromagnetic spectrum," 47 U.S.C. 309(j)(3)(D) (emphasis added) The Commission has always required that an SMR licensee construct and place all authorized channels in service within a specified period of time, and the Commission diligently recovered unconstructed channels for relicensing. For the greater part of the life of the SMR service, the Commission required that 70 mobile units be placed in operation on each 25 kHz wide channel within a certain period. On comparable non-SMR 800 MHz band spectrum, the Commission defines full channel loading as 100 mobiles. Based on this regulatory foundation, the Commission's failure to require use of spectrum under a geographic license which is at least as efficient and intense as it has required under the site-by-site method of regulation was a clear violation of 47 U.S.C. §309(j)(3)(D).

The refusal to set strict requirements for efficient and intense spectrum use was also unlawful because an auction of SMR spectrum would give to geographic licensees a lesser regulatory burden than is imposed on site-by-site licensees. Section 309(j)(6)(D) of the Act provides that the Commission's authority shall not be construed "to convey any rights . . . that differ from the rights that apply to other licenses within the same service that were not issued pursuant to [auction]," 47 U.S.C. §309(j)(6)(D). Providing geographic area licensees with any less of a requirement to use the spectrum efficiently than is imposed on site-specific licensees would demonstrate that the Commission had failed to comply with Section 332 of the Act by not considering whether its actions will "improve the efficiency of spectrum use," 47 U.S.C. §332(a)(2).

Without a specific prohibition or requirement, the Commission would appear to allow a geographic area licensee to construct no more than half of its authorized channels using a single "cheater" transmitter, that is, a transmitter which is capable of scanning among half of the authorized channels, but is not capable of transmitting on half of the authorized channels simultaneously. So that each applicant can adequately address its business plan, obtain financing, and assess the availability of suitable equipment, the Commission should more specifically require that a geographic area licensee construct sufficient facilities to operate on a least 50 percent (and preferably more) of the authorized channels or spectrum concurrently in at least one location.

There was a complete departure from logic with respect to the matter of how a geographic area licensee obtains renewal of a license. According to the Commission, one must construct a system which is substantially above the standard for renewal. Yet, if one provides mediocre service which makes one barely eligible for renewal, that one is eligible for renewal and that minimal eligibility alone would preclude the agency from any take-back or other measures which would compel any greater effort by a geographic area licensee. So what, in fact, is the construction standard? The standard upon which renewal shall be granted, or something greater? And if something more is required, how will the Commission react if that greater standard is not met?

At paras. 218-222 of the Order, the Commission stated that the provision of substantial service will entitle the EA licensee to an "renewal expectancy". The Order also referred to performance which would barely warrant renewal. This implies that mediocre service will still entitle the EA licensee to renewal, but without any expectancy of same. If one can barely obtain renewal with something less than substantial service, then why does a licensee need to be concerned with providing substantial service. The Order's explanation provided no guidance as to the minimum threshold which a geographic area licensee must meet to comply with the Commission's vague construction or service standards. Since a licensee could apparently obtain a renewal with something less than substantial construction, the Commission would not appear to have a basis for imposing any additional burden on or taking any adverse action against a licensee which had not provided substantial service. Upon reconsideration the agency should state with particularity its requirements for renewal of a geographic area license to provide

potential bidders with necessary information for the purpose of devising business plans, financial strategies, determining the availability of equipment, and the like. The uncertainty created by the Commission's statements is so pronounced as to be unworkable and unreasonable.

Transfer of Unconstructed Facilities

The Commission's efforts to make spectrum available within the Lower 230 channels by waiving the construction requirements for affected trading channels requires scrutiny, clarification, and greater justification. First, the Commission has not made clear whether stations which have canceled or will cancel automatically due to the licensee's failure to construct, are included within the agency's waiver. Stated another way, can a licensee of a channel which has canceled by action of law, employ that unconstructed channel in relocating a system within the upper 200 channels? Is Lazarus' License to rise again, or, having once died, will Lazarus, like the rest of us, have to get used to being dead forever? The Commission should definitively explain that, once a license has passed its one year anniversary and facilities have not been constructed and placed in permanent operation, the license cancels and is not revived by the waiver.

At para. 34 of the Order the Commission repeated its disdain for warehousing of spectrum and tried to assure that the use of competitive bidding procedures would not create an incentive for such activity. However, if the agency were to allow licensees of unconstructed Lower 230 channels to be free from the effects of automatic cancellation, while awaiting an opportunity to employ that spectrum for relocation, the agency would be approving warehousing

of that spectrum. Additionally, the warehousing and later use of that spectrum for relocation would preclude the agency's ability to auction that spectrum and receive a fair return to the American public via competitive bidding. Finally, such use of the spectrum would extend the anticompetitive nature of license applications which created in some operators vast inventories of Lower 230 channels for such purpose, thereby denying legitimate operators the opportunity to apply for and use that same spectrum. The net result would, therefore, be the unjust enrichment of licensees which have warehoused spectrum beyond the mandated construction period, to provide to themselves an unfair advantage at auction.

Although SBT believes, in general, that the Commission should not create differing construction requirements for those channels as among different classes of operators, SBT strongly urges the Commission not to interpret, upon reconsideration, its waiver in a manner which offers color of law to otherwise wholly impermissible practices that cannot be found to be within the public interest. Any licensee's failure to construct a facility within a mandated time period should preclude use of that channel for the purposes of relocation. Any other interpretation would be unreasonable, arbitrary and capricious, and not in accord with the Commission's obligation to avoid the creation of unjust enrichment through its procedures.

Relocation Of Upper 200 Channels

The Commission stated at paragraph 91 of its Order that EA licensees will be obligated to relocate mobile units operated in association with its definition of a system. The Commission failed to extend that obligation to control units and upon reconsideration, SBT respectfully

requests that such an extension be made.[6] SBT further notes that the Commission expressly did not extend the obligation to include roamer units. However, such units are an integral portion of any system's operation and the Commission's action might have the unintended result of thwarting the contractual and business relationships of many affected operators, with no concurrent benefit to end users or the public. The Commission gave no notice of any proposal to intrude upon the obligation of contract or to impair the competition of site-based operators. Because a failure or refusal to require that EA licensees relocate all end user units would impair the efficient and intense use of the Lower 230 channels after relocation, and because such a failure or refusal would not "provide services to the largest number of users," 47 U.S.C. §332(a)(3), the Commission should reverse its action and require that EA licensees relocate control stations and all mobile units operating in association with a site-based system, including all roamer units.

The Commission's Authority Under 47 U.S.C. §309(j)

SBT still cannot discern the basis for the agency's claiming to itself the authority to engage in auction of the 800 MHz spectrum, including the Lower 230 channels. The agency's treatment of this issue at paragraph 230 of the Order confounded any rational appreciation of the Commission's efforts in light of the applicable statute. Since it is imperative that the Commission properly address the numerous challenges which many commentors have lodged, SBT suggests something more is required than the Commission's cursory explanation that:

[6] Control stations typically constitute one-fifth of an SMR operator's end user units.

> The Communications Act only requires the Commission to use other such existing means when it is in the public interest. After careful analysis of this spectrum, we conclude that the likelihood of mutually exclusive application in the 800 MHz SMR band is considerable and that not all potential conflicts will be eliminated through negotiations or other existing means. We therefore conclude that the public interest will be served by using competitive bidding procedures.

The Commission badly misread the statute. The most natural reading of the statute is that Congress said that the public interest would be served by Congress's continuing to obligate the Commission to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings," 47 U.S.C. §309(j)(6)(E).

The statute did not give the Commission the authority to decide that it did not need to avoid mutual exclusivity, that it could choose to invite the injury so that it would have the opportunity to apply a bandage. Neither did the Balanced Budget Act of 1997 grant the Commission authority to conduct an auction in the absence of mutual exclusivity. In sum, a situation of mutual exclusivity is required for the Commission to conduct an auction, and the Commission is under an obligation to use whatever means may be available to avoid mutual exclusivity.

Assuming that the Commission were correct in believing that the likelihood of mutual exclusive applications is worthy of consideration, it failed to take the next most obvious step of actually considering means to avoid mutual exclusivity. The recognition of the possibility of mutual exclusivity triggered the Commission's obligation to use some means to avoid mutual

exclusivity. While not all conflicts might be resolved by certain other means, if other means would avoid even one instance of mutual exclusivity, then the statute requires that the Commission use those means.[7]

In June, the Commission said that it had engaged in "careful analysis of this spectrum". But in July and August, it cautioned potential bidders that they cannot rely on information supplied by applicants concerning construction of facilities and that the Commission would not warrant that it would complete action on pending matters affecting spectrum availability and value before an auction. Accordingly, SBT must ask, "On what information did the Commission base its careful analysis?" SBT must also ask why the Commission has not released that information which it carefully analyzed and has not warranted that information's accuracy and completeness so that interested persons can rely on it. In short, either the Commission had the information necessary to conduct a careful analysis of the 800 MHz SMR spectrum and to reach its conclusion, or it did not. If it did have information which can be carefully and meaningfully analyzed, then the Commission was wrong in its subsequent Public Notices, and the Commission

[7] As an illustration, but not necessarily as advocacy, of a simple, quick, and efficient means of avoiding mutual exclusivity, SBT suggests that the Commission could open a filing window for the acceptance of applications. Each applicant would be permitted to file only one application, separately, for each of the frequency blocks-areas to be licensed. If an entity filed any application, its parent, subsidiaries, partners, and affiliates would be barred from filing any application for any area. Each application would be marked with the date, hour, minute, and second of its receipt, using a method which prevented any two applications from being received at the same time. Because the Commission would then process each application exactly in the order received, there would be no mutual exclusivity and no lottery, and no authority in the Commission for collecting a portion of the value of the spectrum for the public. Such a procedure would surely allow licenses to be granted more quickly than by any auction.

should release that information and warrant its accuracy. If the Commission did not have such information, then its conclusion was unreasonable or arbitrary and capricious.

While the Commission stated that it had conducted a careful analysis of spectrum use and is, therefore, put to the test of explaining an obvious contradiction, SBT notes, alternatively, that the Commission did not explain how even fully complete and correct information concerning use of the 800 MHz SMR spectrum allowed it to predict the probability of mutual exclusivity. The instances of mutual exclusivity under site-specific licensing were vanishingly few in number or percent. Without some evidence for and explanation of a correlation between use under site-specific licenses and likelihood that at least two persons who can be identified as having some rational connection to existing use will apply for the same geographic area license, the use of the spectrum did not provide any logical basis for the conclusion that the likelihood of mutual exclusivity was considerable.

Application and Bidding Procedures

Insofar as the Commission attempted to delegate to the Wireless Telecommunications Bureau the authority to amend or alter the amounts of up-front payments and any "stopping rule" as each applies to an auction, without setting forth specific standards or parameters for the Bureau's future action, any action taken pursuant to that delegated authority violate the Administrative Procedure Act. In the absence of a formula which would remove all discretion from the Bureau in changing a rule adopted by notice and comment rule making, the Commission is without the power to delegate authority to change its substantive rules.

Accordingly, SBT requests that upon reconsideration, the Commission correct its improper delegation of authority and set forth permanent rules pursuant to notice and comment rule making.

The Commission's finding fault with the comments regarding the dissemination of licenses to women and to minorities violated the agency's duty. The Commission improperly shifted to commentors the burden of coming forward with proof regarding past discrimination, if, indeed, anyone other than Congress was required to produce anything more than the proof necessary to enact the statute. The statute does not require that the Commission, or anyone, establish a record of discrimination before doing what the Commission is directed to do, and the statute leaves no discretion in the Commission to decline to carry out the duty. The statute does require that the agency "ensure" dissemination of licenses among four, specified protected classes. If anyone is required to obtain a record to carry out a statutory duty, then it is the Commission, and not the public or interested persons, who must meet the requirement. Upon reconsideration, the agency must carry out the duty imposed on it by Congress. If the Commission believes that a record is required to support its execution of its duty to comply with the Adarand decision, then the Commission is obligated to go out and find one, because the statute does not give the Commission to authority to decline to ensure license dissemination to each and every one of the designated entities.

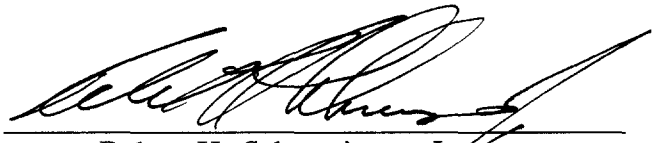
A Possible Obstruction To Licensing Of The Lower 230

There is a "glaring" shortcoming in the Commission's Order which could severely disrupt incumbent licensees and unreasonably extend the time before geographic licenses for the Lower 230 channels are granted. At paragraphs 123 to 125 of the Order, the Commission stated that reimbursement for a relocating EA by a benefitting EA is required "when the frequencies of the incumbent have been cleared," or when the channels "are available for use". Assume that two EA licensees each give notice to an incumbent of an intent to relocate. Assume that neither is willing either to relocate the incumbent's entire system by itself or to pay its share "up-front" and rely on the other for reimbursement. Each EA licensee glares at the another indefinitely, saying, "No, you go first, my friend. After you, please". The incumbent knows that he has an obligation to proceed in good faith, but at some point the incumbent should be permitted to terminate the negotiations permanently, without having to undertake the costs of seeking an outside resolution to a conflict to which the incumbent is an innocent party. To prevent such a situation of glare, relieve the incumbent of an unreasonable level of uncertainty, and allow the licensing of the Lower 230 channels to proceed expeditiously, the incumbent should be permitted, after a certain period of inability of two or more EA licensees to agree on how to proceed, to declare that negotiations are at an end and that the incumbent system will not be relocated. On reconsideration, the Commission should establish the maximum period of uncertainty that the incumbent will be required to endure before the incumbent can call a halt to foolishness.

Conclusion

For the foregoing reasons, SBT respectfully requests that the Commission reconsider its Order, consistent with the comments and suggestions made herein.

Respectfully submitted,
SMALL BUSINESS IN TELECOMMUNICATIONS

By 
Robert H. Schwaninger, Jr.

Brown and Schwaninger
1835 K Street, N.W.
Suite 650
Washington, D.C. 20006
202/223-8837

Dated: September 2, 1997

CERTIFICATE SERVICE

I hereby certify that on the second day of September 1997, I served a copy of the foregoing Petition for Reconsideration on the following by placing a copy in the United States Mail, first class postage prepaid:

William E. Kennard
General Counsel
Federal Communications Commission
1919 M Street, N.W.
Room 614
Washington, D.C. 20554

E.T. Communications Co.
2040 Radisson Street
Green Bay, Wisconsin 54302

Morris Communications, Inc.
Post Office Box 16419
Greenville, South Carolina 29606

Nielson Communications, Inc.
23 East Oak Street
Sturgeon Bay, Wisconsin 54235-2786

Automated Business Communications
2040 Radisson Street
Green Bay, Wisconsin 54302

Nashtel, L.L.C.
Fisher Wayland Cooper
Leader & Zaragoza, L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006

Frederick J. Day, Esq.
1110 N. Glebe Road, Suite 500
Arlington, Virginia 22201

Don Clark Radio Communications
550 W. Pacific Street
Blackfoot, Idaho 83221

Radio Communications Center
3508 East Highland Drive
Jonesboro, Arkansas 72401

Keller Communications, Inc.
11074 Harry Hines Boulevard
Dallas, Texas 75229

B & C Communications
1330 Stimmel Road
Columbus, Ohio 43224

Cellular Telecommunications
Industry Association
1250 Connecticut Avenue, NW
Suite 200
Washington, D.C. 20036

Diamond L Industries, Inc.
715 North Highway 14 & 16
Suite 290
Gillette, Wyoming 82717-0787

Dakota Electronics
424 County Road 19
Rural Route 1
Aberdeen, South Dakota 57401

Bis-Man Mobile Phone, Inc.
1417 39th Avenue, SE
Mandan, North Dakota 58554

Brandon Communications, Inc.
115 E. Front Street
Brandon, Minnesota 6315

American Petroleum Institute
Keller and Heckman
1001 G Street, NW
Suite 500 West
Washington, DC 20001

Dru Jenkinson, Inc.
Jana Green, Inc.
Shelly Curttright, Inc.
Paul C. Besozzi, Esq.
Besozzi, Gavin and Graven
1901 L Street, NW
Suite 200
Washington, DC 20036